

**1217 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE BY A PROBATION, PAROLE, OR EXTENDED SUPERVISION AGENT — § 940.225(2)(i)**

**Statutory Definition of the Crime**

Second degree sexual assault, as defined in § 940.225(2)(i) of the Criminal Code of Wisconsin, is committed by a (probation) (parole) (extended supervision) agent who has sexual (contact) (intercourse) with an individual on (probation) (parole) (extended supervision), and who supervises that individual in his or her capacity as an agent.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant was a (probation) (parole) (extended supervision) agent.<sup>1</sup>
2. The defendant had sexual (contact) (intercourse) with (name of victim).<sup>2</sup>

Consent to sexual (contact) (intercourse) is not a defense.<sup>3</sup>

3. (Name of victim) was on [probation] [parole] [extended supervision].
4. The defendant supervised (name of victim) in (his) (her) capacity as a (probation) (parole) (extended supervision) agent.<sup>4</sup>

**Meaning of ["Sexual Contact"] ["Sexual Intercourse"]**

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL

CONTACT” AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF “SEXUAL INTERCOURSE” AND INSERT THE APPROPRIATE DEFINITION HERE.

### **Jury’s Decision**

If you are satisfied beyond a reasonable doubt that all four elements of second degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI-Criminal 1217 was originally published in 2004 and revised in 2007 and 2013. This revision was approved by the Committee in December 2021; it updated the comment.

This instruction is drafted for violations of § 940.225(2)(i), created by 2003 Wisconsin Act 51, effective date: September 5, 2003.

The instruction uses a simplified statement of the statutory description of the supervision requirement in sub. (2)(i), which reads in part as follows:

... agent who supervises the individual, either directly or through a subordinate, ... or who has influenced or has attempted to influence another probation, parole, or extended supervision agent’s supervision of the individual.

If a case involves supervising “through a subordinate” or “influencing or attempting to influence” another agent’s supervision, the introductory definition of the offense and the fourth element must be modified.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. sec. 940.225(1)(d), which makes it a first degree sexual assault to commit what would otherwise be a second degree sexual assault “against an individual who is 60 years of age or older.” Wis JI-Criminal 1204 provides a model for integrating the instruction for the second degree offense into instruction for a violation of § 940.225(1)(d).

1. The statute does not provide a definition of “probation, parole or extended supervision agent.” However, another Criminal Code statute, § 940.20(2m)(a)2. provides the following:

“Probation, extended supervision and parole agent” means any person authorized by the

department of corrections to exercise control over a probationer, parolee or person on extended supervision.

2. The definition of the offense in § 940.225(2)(i) includes the following statement:

This paragraph does not apply if the individual with whom the actor has sexual contact or sexual intercourse is subject to prosecution for the sexual contact or sexual intercourse under this section.

It is not clear to the Committee whether this statement presents an issue for the court or for the jury. In addition, it is not clear what “subject to prosecution” means. The legislative history indicates that this language was added to the original bill in response to concerns of the Attorney General that “the bill as [originally] drafted would make a crime any incident in which a correctional officer is a victim of a sexual assault.” Letter of February 26, 2003, from Attorney General Lautenschlager to Reps. Bies and Albers, Co-Chairpersons, Assembly Committee on Corrections and the Courts. (Emphasis in original.)

In State v. Blum, an unpublished decision (No. 2010AP2363 CR, decided August 1, 2012), the court of appeals concluded that the “subject to prosecution” issue is a question of law for the court, not an affirmative defense that should be determined by the fact finder at trial. [Cited for informational purposes; see § 809.23(3)(b).] Blum involved a prosecution under § 940.225(2)(h), which has the same statement relating to “subject to prosecution.”

3. “Without consent” is not an element of this offense because it is not included in the offense definition. Further, § 940.225(4) provides in part: “Consent is not an issue in alleged violations of sub. (2)(c), (cm), (d), (g),(h), and (i).” The Committee concluded that it may be helpful to advise the jury of this fact.

4. This is a simplified statement of the statutory description of the supervision requirement in sub. (2)(i), which reads in part as follows:

. . . agent who supervises the individual, either directly or through a subordinate, . . . or who has influenced or has attempted to influence another probation, parole, or extended supervision agent’s supervision of the individual.

The fourth element must be modified if the case involves supervision “through a subordinate” or “influencing or attempting to influence” another agent’s supervision.